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No. 96-1811

In the

Supreme Court of the United States

October Term, 1996

TERRY L. MORRIS, *et al.*,

Petitioners,

v.

JOHN L. WRIGHT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE STATES OF MARYLAND, ALASKA, ARIZONA, DELAWARE, FLORIDA, HAWAII, INDIANA, LOUISIANA, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, VIRGINIA, WASHINGTON, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the administrative remedy exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), apply to cases pending on the date of its enactment when it does not attach new legal consequences to completed transactions and does not upset settled expectations or vested rights?

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Pursuant to Sup. Ct. R. 37, the signatory States submit this brief as *amici curiae* in support of petitioner.

INTEREST OF *AMICI CURIAE* AND INTRODUCTORY STATEMENT

The States have a strong interest in the important questions that this case presents for two reasons. First, applying the administrative exhaustion requirement of the

Prison Litigation Reform Act ("PLRA" or the "Act") to cases pending on the date of its enactment provides the States with the initial opportunity to address innumerable complaints regarding prison conditions. The exercise of that opportunity will significantly increase the likelihood that many prisoner claims will be resolved through the administrative process by screening out the frivolous and truly legitimate claims, thereby resulting in the elimination of a substantial number of federal actions.

Second, this case is likely to affect the largest category of civil suits in the federal judicial system -- prisoner civil rights actions -- because the pertinent language of the PLRA's administrative exhaustion provision is substantially similar to that contained in several other provisions of the same Act. Those provisions collectively facilitate the States' operation of their prison systems by curbing the flood of baseless inmate litigation clogging the courts and reducing the unnecessary expenditure of tremendous resources wasted on such litigation.

In short, the States are interested in this case because its resolution will have a dramatic impact on the States' core governmental function of overall prison management due to the effect it will have on a great number of actions in which the States are involved. The proper application of the PLRA's administrative exhaustion requirement, therefore, needs to be clarified, particularly because of sharp conflicts between the decision below and decisions of this Court and other federal courts of appeals. In holding that the administrative exhaustion requirement set forth in 42 U.S.C. § 1997e(a), as amended by the PLRA, is limited only to cases commenced after April 26, 1996, the court of appeals applied an unduly restrictive interpretation of the statutory language "[n]o action shall be brought," and reached a decision that cannot be reconciled with either this Court's statutory retroactivity analysis enunciated in *Landgraf v.*

USI Film Products, 114 S.Ct. 1483 (1994), or decisions of other federal appellate courts construing substantially similar language in other provisions of the PLRA. As a result, the lower court's decision sweeps aside fundamental principles of federalism and imposes severe financial and administrative burdens on the States' correctional and legal systems as well as the federal judiciary.

The sheer volume of meritless prisoner lawsuits imposes substantial and unique burdens on State correctional systems in two significant ways: (1) by diverting prison staff from their core function of maintaining the safety and security of their institutions, and (2) by wasting scarce resources that could be used for other, more constructive purposes such as improving prison conditions and training prison personnel. *See* Robert G. Doumar, *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 ST. LOUIS U. PUB. L. REV. 21, 36-37 (1994). The resulting fiscal impact is enormous: the National Association of Attorneys General recently estimated that inmate civil rights suits cost the States at least $81.3 million per year, the vast majority of which is attributable to non-meritorious cases. *See* Letter from Inmate Litigation Task Force of the National Association of Attorneys General to Senator Robert Dole (Sept. 19, 1995), 141 Cong. Rec. S14,417-14,418 (daily ed. Sept. 27, 1995).

The flood of meritless prisoner lawsuits also has a third deleterious effect of undermining prison authority by giving prisoners the impression that they can file a lawsuit to "get back" at the system which imprisoned them and that this ability to sue is on a par with society's authority to incarcerate them. *See* Kathleen Engel & Stanley Rothman, *The Paradox of Prison Reform: Rehabilitation, Prisoners' Rights, and Violence*, 7 HARV. J.L. & PUB. POL'Y 413, 431-33 (1984). This "message of moral equivalence" undercuts a fundamental purpose of incarceration: "that individuals

who have committed serious crimes are the legitimate objects of society's reproof and punishment." *Senate Judiciary Committee Hearing on Prison Reform: Enhancing the Effectiveness of Incarceration*, 141st Cong., 2d Sess. (July 27, 1995) (statement of Sen. Abraham). *See also* Engel & Rothman, 7 HARV. J.L. & PUB. POL'Y at 431-33.

The serious problems caused by frivolous prisoner litigation affect every jurisdiction in the country, not just the four petitioner States in this case. That litigation imposes severe burdens on the federal judicial system by the "squandering [of] judicial resources with little offsetting benefit to anyone." *Sandin v. Conner*, 115 S.Ct. 2293, 2299 (1995). From September 1995 to September 1996, for example, prisoners commenced almost 8,700 appeals in federal civil rights actions, comprising 24% of all civil appeals in the U.S. courts of appeals. *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts* 88-89, Table B-1A (1996). In the twelve-month period ending June 1996, prisoners filed more than 43,000 civil rights actions in the federal district courts, comprising 15.8% of all civil actions in those courts. *See* Administrative Office of the United States Courts, *Statistical Tables for the Federal Judiciary* 28, Table C-2 (1996). This volume of prisoner petitions adversely affects the ability of the federal courts to identify and administer meritorious prisoner cases properly and detracts from the courts' ability to devote their attention to other cases. *See* 141 Cong. Rec. S14,413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (frivolous prisoner lawsuits negatively "affect the quality of justice enjoyed by law-abiding citizens"); Doumar, 14 ST. LOUIS U. PUB. L. REV. at 29-30, 36.

The States have an important interest in the outcome of this case, therefore, because many pending prisoner lawsuits

were filed before April 26, 1996 and will be affected by a decision that extends the PLRA to cases pending on the date it was enacted. Certiorari is warranted to resolve the conflicts between the decision below and decisions of this Court and other federal appellate courts, and to establish the proper application of the administrative exhaustion requirement of the PLRA.

REASONS FOR GRANTING REVIEW

I. THE DECISION BELOW CONFLICTS WITH *LANDGRAF V. USI FILM PRODUCTS*, 114 S.Ct. 1483 (1994), AND OTHER DECISIONS OF THIS COURT.

Relying on a footnote from this Court's decision in *Landgraf*, the court of appeals held that it would be impermissibly retroactive to apply the PLRA's administrative exhaustion requirement to prisoners whose claims were filed before April 26, 1996, as those claims were already properly filed under the old law. (App. A-8) (citing 114 S.Ct. at 1502 n.29). The lower court's decision conflicts with this Court's statutory retroactivity analysis enunciated in *Landgraf*, with this Court's decisions emphasizing the importance of the States' interest in managing their prisons and in having the initial opportunity to correct errors made in administering their correctional systems, and with Congress's primary purpose in enacting the PLRA.

As this Court has recognized, a statute does not operate retroactively merely because it applies to conduct antedating the statute or reduces the possibility of prevailing in a pending case. *Landgraf*, 114 S.Ct. at 1499. "Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* A statute will have retroactive effect if "it would impair rights a party possessed when he acted,

increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 1505. A determination that a particular rule operates "retroactively" depends upon the nature and extent of both the change in the law and the connection between the operation of the new rule and a relevant prior event. *Id.* at 1499.

Changes in jurisdictional rules are not considered to have retroactive effect and are properly applied to pending suits because a jurisdictional statute goes to the power of the court rather than to the rights of the parties. *Id.* at 1501-02. The application of a new jurisdictional rule is not considered to take away any substantive right, "but simply changes the tribunal that is to hear the case." *Id.* at 1502 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). Similarly, changes in procedural rules may also be properly applied to pre-existing suits without raising retroactivity concerns because those rules regulate only secondary rather than primary conduct. *Id.*

A requirement that a prisoner exhaust administrative remedies before filing a civil rights action in federal court is a procedural or jurisdictional rule that does not have an impermissibly retroactive effect. Indeed, administrative exhaustion requirements have at times been characterized as essentially procedural in nature because they prescribe the basic scheme under which a claim may be heard in federal court, *see Darby v. Cisneros*, 113 S.Ct. 2539, 2543-48 (1993); *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), and at other times have been considered to be effectively jurisdictional. *See Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 137 (1981) (Brennan, J., concurring) (observing that a "requirement of exhaustion of state administrative remedies was certainly a mandatory precondition to suit, and in that sense a 'jurisdictional prerequisite'"). *See also* Petition at 15 (citing cases for the

proposition that the exhaustion requirement under the Federal Tort Claims Act is jurisdictional). In either event, requiring a prisoner to pursue administrative remedies prior to filing suit in federal court attaches no new legal consequences to events completed before the PLRA's enactment, impairs no rights, and imposes no new duties with respect to completed transactions.

Nor does the requirement that a prisoner exhaust administrative remedies affect the merits of the prisoner's underlying claim or deny access to the courts. Rather, as the dissenting judge below recognized, "[t]he purpose of the new statute is simply to defer a decision pending exhaustion of remedies" (App. A-22), and "this new statute changes no 'primary' or substantive right but only 'secondary' rights governing the tribunal that will first conduct a hearing, make a record and resolve the dispute." (App. A-24-A-25). The statute simply gives the States the initial opportunity to address, and possibly resolve in a manner satisfactory to all parties, grievances concerning prison conditions.

Moreover, the PLRA's exhaustion requirement does not upset any settled expectations or vested rights, as a court could have required a prisoner to exhaust administrative remedies prior to the PLRA. *See* 42 U.S.C. § 1997e(a) (1995) ("[T]he court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.").[1]

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[1] Under former § 1997e(a), exhaustion could not be required unless the U.S. Attorney General had certified or a court had determined that the State's administrative scheme substantially complied with certain minimum acceptable standards of fairness. As of July 8, 1996, the U.S. Department of Justice had certified

(continued...)

Thus, § 1997e(a) does not raise any retroactivity concerns under *Landgraf* because a prisoner never had an absolute right to avoid pursuing available administrative remedies.

The court of appeals concluded, however, that § 1997e(a) does not concern the court's jurisdiction or power; rather, "it is merely an exhaustion requirement." (App. A-11). As a result of that conclusion, the court accorded no weight to either the States' fundamental interest in administering their prisons or the corresponding interest in being afforded the first opportunity to address problems relating to prison conditions. As this Court has recently reaffirmed, however, "[t]he strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors . . . also require giving the States the first opportunity to correct errors made in the internal administration of their prisons." *Lewis v. Casey*, 116 S.Ct. 2174, 2185 (1996) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973)). *See also Nasim v. Warden, Maryland House of Correction*, 64 F.3d 951, 959 (4th Cir. 1995) (en banc) (Wilkinson, J., concurring), *cert. denied*, 116 S.Ct. 1273 (1996) ("State bodies should be the ones to hear complaints about state prison management."). The court of appeals was wrong, therefore, to give no weight to this important State interest.

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[1](...continued)
twenty-three State administrative procedures (two of which had lapsed) and an additional eight local and county procedures (one of which had lapsed and one of which was conditional). FEDERAL BUREAU OF PRISONS, CERTIFICATION OF INMATE GRIEVANCE PROCEDURES PURSUANT TO THE CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT (Nov. 1995 & July 8, 1996 Update). The PLRA no longer distinguishes between certified and non-certified procedures, but requires exhaustion of all available administrative remedies.

The court exacerbated that error in casting aside Congress's primary purpose in enacting the PLRA: "imposing legitimate limits on the ability of inmates to tie the courts and prisons in knots through frivolous lawsuits . . . and reducing litigation costs." *Senate Judiciary Committee Hearing on Prison Reform: Enhancing the Effectiveness of Incarceration*, 141st Cong., 2d Sess. (July 27, 1995) (statement of Sen. Hatch). *See also* 141 Cong. Rec. S14,316 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham) (PLRA "will discourage frivolous lawsuits and promote State control over State prison systems"); *Senate Judiciary Committee Hearing on Prison Reform: Enhancing the Effectiveness of Incarceration*, 141st Cong., 2d Sess. (July 27, 1995) (testimony of William P. Barr) ("[T]he business of running prisons belongs to the appropriate state officials, not to federal judges, justice department officials, or special masters . . . ."). As the dissenting judge below recognized, applying 42 U.S.C. § 1997e(a) to cases pending on the date of its enactment fulfills this purpose by serving "the important function of allowing the State to deal with these particularly local problems on its own, while preserving for the state prisoner an expeditious federal forum for the vindication of his federally protected rights, if the State has denied that redress." (App. A-20-A-21) (quoting *Preiser*, 411 U.S. at 498).

In disregarding these goals, the court of appeals' decision leaves in place the precise problem that Congress sought to address when it enacted the PLRA: reducing the staggering amount of frivolous prisoner litigation clogging the federal courts and consuming the States' time and resources. The decision below should be reviewed because it is fundamentally inconsistent with this Court's precedents.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

Review is also warranted because the court of appeals' decision is in conflict with decisions of several federal appellate courts construing other provisions of the PLRA that contain language similar to the "[n]o action shall be brought" language contained in 42 U.S.C. § 1997e(a). *See* 28 U.S.C. § 1915(a)(2) ("A prisoner *seeking to bring* a civil action or appeal" without prepayment of fees must submit a certified copy of the prisoner's trust account) (emphasis added); *id.* § 1915(b)(1) ("if a prisoner *brings* a civil action or *files* an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee") (emphasis added); *id.* § 1915(g) ("In no event *shall* a prisoner *bring* a civil action or appeal" *in forma pauperis* if the prisoner has had three previous actions dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted) (emphasis added).

Some courts of appeals have narrowly interpreted these statutory variations of "to bring," as the court did below, (App. A-6-A-7), to apply them only to the bringing of new actions. *See Abdul-Wadood v. Nathan*, 91 F.3d 1023 (7th Cir.1996) (three strikes provision applies only to cases filed after the PLRA's effective date); *Thurman v. Gramley*, 97 F.3d 185 (7th Cir.1996) (filing fee provision only applies to new cases and appeals);[2] *White v. Gregory*, 87 F.3d 429 (10th Cir.), *cert. denied*, 117 S.Ct. 528 (1996) (same). In *Abdul-Wadood*, for example, the court of appeals held that, despite the fact that the prisoner had "at least five strikes

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[2] The court in *Thurman* also commented, however, that "we think that the Act generally applies to pending cases." 97 F.3d at 188.

against him," the court would not dismiss any action remaining on its docket (or pending in the district court) because the three strikes provision applies only to new actions or appeals -- "the events that trigger an obligation to pay a docket fee -- rather than the disposition of existing cases." 91 F.3d at 1025.

Contrary to these decisions and to the lower court's conclusion that Congress expressly prescribed the proper reach of 42 U.S.C. § 1997e(a) by its use of the language "[n]o action shall be brought" (App. A-6), other courts of appeals have interpreted the same statutory variations of "to bring" more broadly to apply to pending cases. For example, in *Adepegba v. Hammons*, 103 F.3d 383 (5th Cir.1996), the court of appeals dismissed a prisoner appeal under 28 U.S.C. § 1915(g) on the ground that the prisoner had already filed three frivolous suits that were dismissed prior to the effective date of the PLRA. The court reasoned that although the three strikes provision "attaches consequences to past actions, . . . these consequences are matters of procedure" that do not affect any substantive rights, do not bar access to the courts, and still permit a prisoner to pursue any substantive claim as long as he or she pays the filing fee. 103 F.3d at 386. The court also observed that "[t]he revocation of this privilege [of proceeding *in forma pauperis*] is not new, either," as a court could revoke a prisoner's *in forma pauperis* status even before the PLRA. *Id.* at 387. Accordingly, the court held that the three strikes provision does not raise retroactivity concerns under *Landgraf*. *See also Covino v. Reopel*, 89 F.3d 105 (2d Cir.1996) (filing fee provisions should apply to appeals pending at the effective date of the PLRA);[3] *Ayo*

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[3] The United States Court of Appeals for the Second Circuit has adopted an exception to the general rule of retroactive application

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v. Bathey, 106 F.3d 98 (5th Cir.1997) (same); *Strickland v. Rankin County Correctional Facility*, 105 F.3d 972 (5th Cir.1997) (same); *In re Tyler*, 110 F.3d 528 (8th Cir.1997) (denying prisoner leave to proceed *in forma pauperis* because more than three previous actions had been dismissed as frivolous, all of which occurred before the effective date of the PLRA); *Green v. Nottingham*, 90 F.3d 415 (10th Cir.1996) (same); *Mitchell v. Farcass*, ___ F.3d ___, 1997 WL 225487 at *4 (11th Cir. 1997) (PLRA provision permitting court to dismiss action if it is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune is "wholly procedural" and, therefore, applies to pending cases).

If the reasoning of the courts in *Adepegba* and similar decisions is correct, then that reasoning should apply with equal force to the PLRA's administrative exhaustion requirements. As the dissent below stated, "the statutory language 'no action shall be brought' until all available remedies are 'exhausted,' should be interpreted to mean what is obviously intended -- that a federal court should not 'decide' the merits of any such action prematurely. . . . [I]t is obvious that Congress did not literally mean to bar a prisoner from 'filing' a complaint in court. The only interpretation of the language that makes sense is that a federal court will not adjudicate the claim until after exhaustion." (App. A-23). If, on the other hand, the court below correctly interpreted 42 U.S.C. § 1997e(a) to apply only to cases that are commenced after the PLRA's

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[3](...continued)
and held that the fee provisions need not apply to cases in which the parties or the court had already invested substantial time and effort. *Ducamutef v. O'Keefe*, 98 F.3d 22 (2d Cir.1996); *Ramsey v. Coughlin*, 94 F.3d 71 (2d Cir.1996).

effective date, then that reasoning should apply to the other similarly-worded provisions of the PLRA which have been interpreted differently by other federal appellate courts.

Review is warranted to resolve this confusion among the federal circuits and to clarify the proper application of 42 U.S.C. § 1997e(a).

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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